IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6390 of 1996

Hon'ble MR.JUSTICE S.M.SONI

And

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

BANASKANTHA DISRICT COOPERATIVE MILK PRODUCERS

Versus

INCOME TAX OFFICER

Appearance:

MR JP SHAH for Petitioner

MR PK JANI FOR MR MANISH R BHATT for Respondent

CORAM: S.M. SONI & Y.B. BHATT JJ.

Date: 24.10.1996

ORAL JUDGEMENT (Per Y.B. Bhatt J.)

1. Rule. Mr. M.R. Bhatt waives service of rule on behalf of the respondent. At the request of learned counsel for the respective parties this petition is taken up for final hearing today. Heard Mr. J.P. Shah for the petitioner and Mr. P.K. Jani with Mr. M.R. Bhatt

for the respondents.

2. This petition under Article 226 of the Constitution of India has been preferred by the petitioner challenging the two notices issued by the respondent under section 148 of the Income Tax Act (Annexures G and H to the petition). These notices are for the purpose of reopening the assessment of the assessee under section 147 of the said Act in respect of the assessment year 1990-91.

3. One contention raised by the learned counsel for the petitioner is that the impugned notices under section 148 of the said Act (issued on 8th July 1996 and 5th August 1996) in relation to the assessment year 1990-1991 are time barred inview of subsection (1) of section 141 of the said Act. In other words, the contention is that the notices have been issued after a lapse of over four years from the end of the relevant assessment year.

3.1 This contention though raised, has not been elaborated at length by learned counsel for the petitioner and for this reason, learned counsel for the respondent has also not addressed us on this question. For this reason, although it prima facie appears that the contention, if examined closely, is likely to be sustained, we do not express any finding or opinion.

4. However, the substance of the contention pressed before us is on another issue, the relevant facts in respect whereof are as under:

4.1 In respect of the relevant assessment year, viz. 1990-91, the petitioner-assessee had claimed reliefs under section 80-I and 80-HH of the said Act on account of the establishment of a "new unit", established and created by the dairy of the petitioner. This relief claimed by the assessee was considered on merits and allowed by the Assessing Officer and is thus reflected in the assessment order for the relevant year.

4.2 However, for the reasons which we shall discuss hereinafter, the Assessing Officer thought it fit to issue the impugned notices for the purpose of reopening the assessment in respect of the relevant year, on the basis that certain income which was otherwise subject to tax, has in fact escaped assessment, inasmuch as the reliefs claimed under section 80-I and 80-HH of the Act could not legitimately have been allowed.

4.3 There was some controversy as to whether the reasons had been supplied to the petitioner by the revenue or not. However, during the course of hearing learned counsel for the respondent has placed before us the relevant reasons, on the basis of which the impugned notices under section 148 of the said Act have been issued. We shall advert to these reasons hereinafter.

5. The power available under section 148 of the said Act to reopen the assessment already concluded on the part of the Assessing Officer is subject to sub-section (2) of section 148, which requires the said Assessing Officer to record his reasons, before issuing any notice under the said provision.

5.1 The case law on the subject is by now well settled and there cannot be any serious controversy in this context.

5.2 By now it is well established that the reasons so recorded by the Assessing Officer must arise (1) from the failure on the part of the assessee to make a full and complete disclosure of all relevant and material data and documentation before the assessing officer, or (2) on account of other material to which the attention of the Assessing Officer has been drawn, which material was not available to the Assessing Officer when the original assessment order was passed.

5.3 On the facts and circumstances of the case, learned counsel for the respondent is unable to point out any "other material", apart from the material already on record while passing the original assessment order, on the basis of which the Assessing Officer could have formed an opinion that certain income had escaped assessment i.e. the relief under section 80-I and 80-HH could not have been granted.

5.4 Furthermore, on the facts of the case learned counsel for the respondent is also unable to point out as to what is the relevant and material data and/or documentation which the petitioner ought to have placed before the Assessing Officer in order to sustain his claim for the reliefs in question, which if placed on record would have disentitled the assessee to such reliefs, as subsequently opined by the Assessing Officer.

6. In short, on the facts and circumstances of the case we are now required to examine the reasons which led the Assessing Officer to believe that certain income had escaped assessment, inasmuch as the reliefs under section

80-I and 80-HH could not have been allowed to the assessee.

6.1 As aforesaid, the reasons have now been placed on record by learned counsel for the respondent. Para 1 of the said document merely states that the assessee was allowed deduction under section 80-HH and 80-I as the assessee started a new unit under the name and style of "Operation Flood-II" by installing new machinery, and that the production capacity increased from Rs.1.5 lakhs to 3.5 lakhs per day. This paragraph seems to indicate (or to give an indication as to the line of reasoning which weighed with the Assessing Officer) to the effect that the reliefs as claimed by the assessee were granted by the Assessing Officer merely on the basis of statements or claim made by the assessee per se. This, however, is neither here nor there. The fact remains that the reliefs were granted by the Assessing Officer on merits after considering all the relevant material on record. It, therefore, cannot be accepted that the reliefs were granted merely because the claim was made in that regard.

6.2 However, the real and true reasons for the issuance of the notice under section 148 of the said Act are contemplated in the last paragraph of the said document. This paragraph makes it amply clear that "subsequently it is noticed the assessee extended the existing unit by installing new machineries ....., increased production capacity, since no new unit is established, the deductions under section 80-HH and 80-I have been erroneously allowed." On a plain reading of these so-called reasons we find that this is nothing but a change of mind or a change of opinion on the part of the assessing officer, and amounts to having second thoughts on the basis of the very same material which was before the Assessing Officer when the original assessment order was passed and under which the reliefs were granted. Such a change of opinion cannot justify the exercise of power under section 148 of the said Act with a view to reopen the assessment under section 147 of the said Act. This is by now a well settled position in law. The Supreme Court has laid down in the case of Phool Chand Bajrang Lal Vs. I.T.O. (203 ITR page 456) that the power to reopen the assessment could be exercised if the assessing officer had fresh material or data or information on the basis of which it could possibly be said that some income has escaped the assessment. This power could not be exercised in a case where the assessing officer seeks "to draw any fresh inference, which could have been raised at the time of original

assessment on the basis of the materials placed before him by the appellant", and which inference he failed to draw at the time of the original assessment. The Supreme Court has further observed to the effect that acquiring fresh information, specific in nature and reliable in character, relating to a concluded assessment which went to expose the falsity of the statement made by the assessee at the time of the original assessment was different from drawing a fresh inference from the same facts and material available with the officer at the time of the original assessment proceedings.

7. As already stated hereinabove, it is not the case of the revenue that some income is likely to have escaped assessment on account of the omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for the purpose of assessment. Thus, in order to justify reassessment proceedings, it must be a case where some fresh facts have come to light, which were not previously disclosed or some information with regard to the facts previously disclosed comes into the possession of the assessing officer, which tends to expose the untruthfulness of those facts. In the absence of such a situation, it would amount to a mere change of opinion, or drawing of a different inference, from the same facts as were earlier available.

8. In view of this settled legal position we are bound to conclude that the reasons as recorded by the Assessing Officer under section 148 sub-section (2) of the said Act do not constitute sufficient cause and/or justify "reason to believe" for the exercise of power conferred on him under section 148(1) for the purpose of reopening the proceedings under section 147 of the said Act.

9. In the premises aforesaid, we hold that the impugned notices (at Annexures G and H to the petition) are illegal and contrary to law and are, therefore, quashed and set aside. Rule is made absolute accordingly with no order as to costs.

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